Supreme Court, U.S.
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OFFICE OF THE CLERK

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

SUSAN CARROLL, f/k/a Susan Carroll Capps,
Petitioner,

vs.

LOUIS FAUCHEUX,
Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO
THE SUPREME COURT OF TEXAS

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

For ordinary appeals, the Texas Rules of Appellate Procedure provide that the deadline for perfecting an appeal is extended from 30 days until 90 days upon the filing of certain post-judgment motions. Prior to the decision in this case by the Texas Supreme Court, it remained an open question whether the appellate deadline was similarly extended for accelerated appeals. In 2001, the Texas Legislature passed a statute providing that an appeal from a judgment terminating parental rights is an accelerated appeal. Petitioner, however, was advised by her trial counsel that the deadline for appealing a judgment terminating her parental rights was 90 days because of the filing of a post-judgment motion. In the decision below, the Texas Supreme Court held that the deadline for accelerated appeals is 20 days and is not extended by post-judgment motions in the same manner as ordinary appeals. As a result, petitioner's appeal was dismissed as untimely.

The question presented to the Court is whether the accelerated procedure in Texas governing appeals from termination judgments violates federal due process by depriving parents of an appeal when the parent suffers ineffective assistance of counsel that causes the failure to timely perfect an appeal.

LIST OF PARTIES

All parties do not appear in the caption of the case on the cover page. A list of all parties to the preceding in the court whose judgment is the subject of this petition is as follows:

Susan Carroll Capps (n/k/a Susan Carroll), Petitioner (biological mother of K.A.F.)

Louis Faucheux, Respondent (incorrectly spelled "Faucheaux" in the court below (biological father of K.A.F.)

Karen Anna Carroll-Faucheux, a minor child (incorrectly spelled "Karen Anna-Carroll Faucheaux" in the court below)

Rod J. Paasch, Ad Litem for K.A.F. (no appearance on appeal).

There are no corporate parties.

TABLE OF CONTENTS

QUESTION PRESENTED i

LIST OF PARTIES ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS 1

STATEMENT OF THE CASE 4

REASONS FOR GRANTING THE PETITION 8

A. *The Texas Scheme of Accelerating Appeals in Parental Termination Cases Implemented in 2001 Deprives Parents of Appellate Rights in Violation of the Fourteenth Amendment When the Failure to Timely Appeal Arises from Ineffective Assistance of Counsel.* 8

B. *The Federal Constitutional Issue was Preserved Below.* 17

CONCLUSION 22

APPENDIX

TABLE OF AUTHORITIES

Cases

Black v. State, 816 S.W.2d 350, 368-69 (Tex. Crim. App. 1991) 20

Ex parte Axel, 757 S.W.2d 369 (Tex. Cr. App. 1988) 12

Griffin v. Illinois, 351 U.S. 12 (1956) 16

Hone v. Hanafin, 104 S.W.3d 884, 888 (Tex. 2003) ... 7

Iavorski v. INS, 232 F.3d 124, 127 (2d Cir. 2000) ... 14

In re B.G., 104 S.W.3d 565 (Tex. App.--Waco 2002, no pet.) (order) 10, 11

In re G.M., 596 S.W.2d 846, 847 (Tex. 1980) 8

In re J.F.C., 96 S.W.3d 256, 264-64 (Tex. 2002) 8

In re K.G., No. 11-04-00086-CV, 2004 Tex. App. LEXIS 3378 (Tex. App. – Eastland April 15, 2004, no pet. h.) 12

In re M.E.P., No. 01-03-00796-CV, 2004 Tex. App. LEXIS 2312 (Tex. App. – Houston [1st Dist.] March 11, 2004, no pet. h.) 12

In re M.S., 115 S.W.3d 534, 544 (Tex. 2003) .. 9, 14-17, 20

M.L.B. v. S.L.J., 519 U.S. 102 (1996) 9, 16

Mathews v. Eldridge, 424 U.S. 319 (1976) 14

New Jersey Div. of Youth and Family Servs. v. R.G., 806 A.2d 408 (N.J. Super. Ct. App. Div. 2002) 12-14

Reed v. Ross, 468 U.S. 1 (1984) 19

Rinaldi v. Yeager, 384 U.S. 305, 310 (1966) 9

Santosky v. Kramer, 455 U.S. 745, 769 (1982) . 8, 13, 15

Smith v. State, Nos. 05-03-00634-CR & 05-03-00635-CR, 2003 Tex. App. LEXIS 4265, *1 n.1 (Tex. App. – Dallas May 20, 1993, no pet.) 12

Sosa v. Texas Dep't of Protective Servs., No. 03-04-00351-CV, 2004 Tex. App. LEXIS 6833, *2-4 (Tex. App. – Austin, July 29, 2004, no pet.)stin, July 29, 2 11

Verburgt v. Dorner, 959 S.W.2d 615, 616 (Tex. 1997) 5, 17

Statutes and Constitution

TEX. FAM. CODE, § 109.002(a) 2, 4, 9, 10, 17

TEX. FAM. CODE, § 263.405(a) 10

U.S. CONST. amend. XIV, § 1 ..... 1, 14

Rules

TEX. R. APP. P. 26.1 ..... 2, 5, 11

TEX. R. APP. P. 26.2(a)(2) 11

TEX. R. APP. P. 26.3 11

TEX. R. APP. P. 28 ..... 3, 5

Tex. R. App. P. 49.9 ..... 6, 18

Other Authorities

Michael D. Bustamante, *Incorporating the Law of Criminal Procedure in Termination of Parental Rights Cases: Giving Children a Voice through* Mathews v. Eldridge, 32 NEW MEXICO L. REV. 143 (Spr. 2002) 16

Susan Calkins, *Ineffective Assistance of Counsel in Parental-Rights Termination Cases: The Challenge for Appellant Courts*, 6 THE JOURNAL OF APPELLATE PRACTICE AND PROCESS 179-235 (Fall 2004) 20

IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

The opinion of the Texas Supreme Court is reported at 160 S.W.3d 923 (Tex. 2005), and it is attached as Appendix 1.

The opinion of the Court of Appeals of Texas for the Ninth District at Beaumont is not yet published but may be obtained at 2004 Tex. App. LEXIS 2447, and it is attached as Appendix 2.

JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(a).

The judgment of the Texas Supreme Court was entered April 8, 2005. A timely motion for rehearing was filed and overruled on May 13, 2005. The order is available at 2005 Tex. LEXIS 381 and is attached as Appendix 3. This petition is timely filed pursuant to Supreme Court Rules 13.1 and 29.2.

Notification required by Rule 29.4(c) has been made.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fourteenth Amendment, Section 1, of the United States Constitution provides:

Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 109.002(a) of the Texas Family Code provides:

(a) An appeal from a final order rendered in a suit, when allowed under this section or under other provisions of law, shall be as in civil cases generally. An appeal in a suit in which termination of the parent-child relationship is in issue shall be given precedence over other civil cases and shall be accelerated by the appellate courts. The procedures for an accelerated appeal under the Texas Rules of Appellate Procedure apply to an appeal in which the termination of the parent-child relationship is in issue.

Texas Rule of Appellate Procedure 26.1 provides:

RULE 26. TIME TO PERFECT APPEAL

26.1. Civil Cases

The notice of appeal must be filed within 30 days after the judgment is signed, except as follows:

(a) the notice of appeal must be filed within 90 days after the judgment is signed if any party timely files:

(1) a motion for new trial;

(2) a motion to modify the judgment;

(3) a motion to reinstate under Texas Rule of Civil Procedure 165a; or

(4) a request for findings of fact and conclusions of law if findings and conclusions either are required by the

Rules of Civil Procedure or, if not required, could properly be considered by the appellate court;

(b) in an accelerated appeal, the notice of appeal must be filed within 20 days after the judgment or order is signed;

(c) in a restricted appeal, the notice of appeal must be filed within six months after the judgment or order is signed; and

(d) if any party timely files a notice of appeal, another party may file a notice of appeal within the applicable period stated above or 14 days after the first filed notice of appeal, whichever is later.

Texas Rule of Appellate Procedure 28 provides:

RULE 28. ACCELERATED APPEALS IN CIVIL CASES

28.1. Interlocutory Orders

An appeal from an interlocutory order, when allowed, will be accelerated. Filing a motion for new trial will not extend the time to perfect the appeal. The trial court need not, but may – within 30 days after the order is singed – file findings of fact and conclusions of law.

28.2. Quo Warranto

An appeal in a quo warranto proceeding will be accelerated. In such a proceeding, filing a motion for new trial will not extend the time to perfect the appeal. But the trial court may grant a timely filed motion for new trial until 50 days after the judgment or appealable order is signed. If not determined by written order within that period, the motion for new trial will be deemed overruled.

28.3. Record and Briefs

In lieu of the clerk's record, the appellate court may hear an accelerated appeal on the original papers forwarded by the trial court or on sworn and uncontroverted copies of those papers. The appellate court may allow the case to be submitted without briefs.

STATEMENT OF THE CASE[1]

On November 3, 2003, Petitioner Susan Carroll, f/k/a Susan Carroll Capps, suffered the ultimate sanction that may be visited on a parent: termination of her parent-child relationship with the youngest of her four children, K. A. F. (R - A). Only 7 days later, trial counsel for Ms. Carroll filed a combined motion for new trial and motion to modify the judgment. (R - F). The motion to modify the judgment was sought in the alternative to the motion for new trial. Ms. Carroll sought to modify the judgment so that she would at least retain visitation rights with K. A. F. in the event the court did not grant a new trial. (R - F, pp. 8-9). Additionally, the second page of the combined document specifically referred to "a subsequent appeal." (R - F, p. 2). Ms. Carroll did not obtain relief in the trial court.

Trial counsel then advised Ms. Carroll that because a post-judgment motion was filed she had 90 days from the date of judgment to perfect an appeal. Trial counsel, however, did not file a notice of appeal on her behalf. Additionally, trial counsel, like many other practitioners, apparently was unaware that just over a year earlier, the Texas Legislature had amended the Texas Family Code to provide that appeals from termination cases are to be treated as accelerated appeals. *See* TEX. FAM. CODE, § 109.002(a) ("[t]he procedures for an accelerated appeal under the Texas Rules of Appellate Procedure apply to an

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[1] The Court of Appeals dismissed this appeal before the appellate record was filed in the court of appeals. Accordingly, record references are to file-stamped copies of relevant pleadings from the trial court record which were included in an appendix attached to Petitioner's Petition for Review to the Texas Supreme Court and used in that court. To prevent confusion with the Appendix attached to this petition, the appendix in the court below will be referenced herein as "R - [tab letter in Texas Supreme Court Appendix]."

appeal in which the termination of the parent-child relationship is in issue."). Normally accelerated appeals are to be perfected within 20 days. *See* TEX. R. APP. P. 26.1(b).

It should be noted as well that the Texas Rules of Appellate Procedure (TRAP's) address only two types of accelerated appeals (interlocutory orders and quo warranto proceedings). *See* TEX. R. APP. P. 28. For these two appeals, the rules provide that one of the four specified post-trial pleadings (i.e., motions for new trial) that act to extend the appellate timetable, does not act to do so in these two instances. *Compare* TEX. R. APP. P. 26.1 *with* TEX. R. APP. P. 28. The rules are silent regarding the effect of filing one of the other three pleadings, such as the motion to modify judgment filed on behalf of Ms. Carroll.

Prior to the expiration of 90 days after the judgement, Ms. Carroll on January 16, 2004 filed a pro se Notice of Appeal confirming her desire to appeal the termination of her parental rights. (*See* R - C). The Court of Appeals questioned its jurisdiction because the notice of appeal was not filed within the 20 day time period for accelerated appeals. Petitioner responded, having by that time obtained pro bono counsel, and argued that her motion to modify judgment extended the appellate timetable, thus making her notice of appeal timely. (*See* R - C). Alternatively, she argued that her combined motion for new trial and motion to modify the judgment itself should be construed as a notice of appeal because it evidenced an intention to appeal on page 2 of the motion. Texas law traditionally has been very lenient regarding instruments which may invoke appellate jurisdiction in order to promote the policy of preserving appellate review whenever any arguable interpretation of the rules will do so. *Accord Verburgt v. Dorner*, 959 S.W.2d 615, 616 (Tex. 1997) (stating that the Texas Supreme Court has "never wavered from the principle that appellate courts should not dismiss an appeal for a procedural defect whenever *any arguable interpretation* of the